UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 07-13829-H

FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION,
Plaintiffs/Counter-Defendants/Cross-Appellants,

FISHERMAN AGAINST DESTRUCTION OF THE ENVIRONMENT,
Plaintiff/Counter-Defendant,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
Intervenor-Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,

v.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,
Defendant/Counter-Claimant/Cross-Appellee,

CAROL WEHLE, Executive Director,
Defendant/Appellant/Cross-Appellee,

UNITED STATES OF AMERICA, U.S. SUGAR CORPORATION,
Intervenor-Defendants/Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICTION OF FLORIDA
THE HONORABLE CECELIA M. ALTONAGA
District Court No. 02-80309-CIV-ALTONAGA

# UNITED STATES' BRIEF AS APPELLANT

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UNITED STATES OF AMERICA, U.S. SUGAR CORPORATION,
Intervenor-Defendants/Appellants/Cross-Appellees.

**RULE 26 CERTIFICATE OF INTERESTED PERSONS**

To the best of undersigned counsel's knowledge, the following is a complete list of persons and entities who have an interest in the outcome of this case, pursuant to Eleventh Circuit Rules 26.1 and 26.1-3, as amended.

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American Farm Bureau Federation

American Rivers

American Water Works Association

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Association of California Water Agencies

Association of Metropolitan Sewerage Agencies

Association of Metropolitan Water Agencies

Association of State Wetland Managers

Audubon Society of the Everglades

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Fishermen Against Destruction of the Environment, Inc.

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State of Missouri

State of Nebraska

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Theodore Gordon Flyfishers, Inc.

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Tongue River Water Users Association

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Tropical Audubon Society

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# UNITED STATES' BRIEF AS APPELLANT

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## STATEMENT OF JURISDICTION

Plaintiffs invoked district court jurisdiction pursuant to 33 U.S.C. § 1365(a). Clerk's Record ("R") 188, p 5l; R. 192, p. 2-3; R. 193, p 2. The district court entered final judgment on June 15, 2007. R. 693. The United States timely filed a

notice of appeal on August 13, 2007. R. 708. This Court's jurisdiction rests on 28 U.S.C. § 1291.

## ISSUES PRESENTED

1. Whether the Clean Water Act ("CWA") requires a National Pollutant Discharge Elimination System ("NPDES") permit when "waters of the United States" are transferred, unaltered and without any intervening industrial, municipal, or commercial use, through a point source from one location to another.

2. Whether the district court erred by concluding that canals in the Everglades Agriculture Area ("EAA") and Lake Okeechobee are meaningfully distinct and therefore an NPDES permit is required to operate pumps located in the earthen dike that lies between the canals and Lake.

## STATEMENT

Plaintiffs brought this CWA citizen suit against the South Florida Water Management District ("SFWMD"), alleging that the SFWMD's operation of three pump stations (the S-2, S-3, and S-4) without an NPDES permit violates the CWA. These pump stations occasionally move water, primarily for flood control purposes, from manmade canals within the Everglades Agricultural Area ("EAA") to Lake Okeechobee, through a manmade dike. This area and the water control structures are all elements of the Central and South Florida Flood Control Project

("C & SF Project"), a heavily-engineered, integrated water management system within the historic Everglades area. The district court interpreted the CWA to require an NPDES permit for water transfers between meaningfully distinct water bodies where the transfer delivers pollutants to the receiving water.[1/] R. 636, pp. 58-84. The district court further held that the EAA canals and Lake Okeechobee are "meaningfully distinct" waters, and that the SFWMD must therefore obtain an NPDES permit to operate these structures. R. 636, pp. 84-89. The district court required SFWMD to apply for an NPDES permit, but otherwise denied injunctive relief. R. 692.

A. Statutory and Regulatory Background.

1. The Clean Water Act. – Congress enacted the CWA to respond comprehensively, as a matter of national policy, to the complex problem of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). The Act establishes an important role for the federal government, but also recognizes the primary responsibilities of the individual States to protect water quality and to manage land and water resources, including allocation of water quantities. 33 U.S.C. § 1251(b), (g); *infra* at 36-40.

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[1/] In this brief, the term "water transfer" refers to any activity that conveys or connects navigable waters through a point source without adding pollutants or subjecting the water to an intervening industrial, municipal, or commercial use.

The CWA addresses the problem of water pollution through a multi-faceted, federal-state approach that distinguishes between point source and nonpoint source pollution and includes provisions directed to research and related programs (33 U.S.C. §§ 1251-1274), grants for construction of treatment works (33 U.S.C. §§ 1281-1301), the establishment and enforcement of standards, including effluent and water quality standards (33 U.S.C. §§ 1311-1330), and the issuance of permits and licenses for point source discharges (33 U.S.C. §§ 1341-1346).

The CWA prohibits "the discharge of any pollutant by any person" except in compliance with other specified sections of the CWA, including § 402. 33 U.S.C. § 1311. The CWA defines "'discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be

discharged." 33 U.S.C. § 1362(14). The term "'navigable waters'" means "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

Section 402 creates the NPDES permitting program, providing that the United States Environmental Protection Agency ("EPA") (or a qualifying State with an EPA-approved program) "may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) [of the CWA] upon condition that such discharge" will meet specified requirements. 33 U.S.C. § 1342(a)(1). NPDES permits typically impose limitations on a point source discharge by establishing permissible rates, concentrations, or quantities of specified constituents at the point where the discharge stream enters the waters of the United States. *See* 33 U.S.C. § 1342(a)(1) and (2); *see generally* 40 C.F.R. Pts. 122, 125; *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 174, 176 (2000). The CWA does not impose, however, analogous permit requirements for nonpoint sources.[2/] Instead, Sections 208, 304(f), and 319 encourage the States to develop local programs, that may include techniques such as land use

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[2/] Sources not regulated under CWA §§ 402 or 404 are generically referred to as "'nonpoint sources.'" *See Nat'l Wildlife Fed'n v. Consumers Power Co.* ("*Consumers Power*"), 862 F.2d 580, 582 (6th Cir. 1988).

requirements, to control nonpoint sources of pollution. *See* 33 U.S.C. §§ 1288(b)(2)(F); 1314(f), 1329.

2. NPDES Permits Generally Have Not Been Issued for Pollution Resulting From Changes in the Movement of Navigable Waters. – As a matter of longstanding practice, EPA and States administering approved Section 402 programs generally have not issued NPDES permits for activities involving mere transport, impoundment, or release of navigable waters, including dam operations and water transfers.[3/] In the 1980s, several courts of appeals concluded, in accordance with EPA's views, that a dam operator need not obtain an NPDES permit for discharges from dams and power facilities even though the impoundment and release of stored water at dams results in changes to water quality. *See Consumers Power*, 862 at 587-89; *Nat'l Wildlife Fed'n v. Gorsuch* ("*Gorsuch*"), 693 F.2d 156, 175 (D.C. Cir. 1982); *Missouri ex rel. Ashcroft v.*

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[3/] The exceptions include EPA's issuance of a permit in response to the First Circuit's decision in *Dubois v. U.S. Dep't. Of Agriculture*, 102 F.3d 1273, 1296-99 (1st Cir. 1996). The State of Pennsylvania began issuing permits for water transfers in 1986, in response to a state court decision mandating the issuance of such permits. *See* 71 Fed. Reg. 32,887, 32,889 n.1 (June 7, 2006). As a result of the district court decision here and the Second Circuit's decisions in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* ("*Catskill I*"), 273 F.3d 481, 490-92 (2d Cir. 2001) and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York* (hereafter "*Catskill II*"), 451 F.3d 77 (2d Cir. 2006), defendants in these cases have applied for NPDES permits.

*Dept. of the Army*, 672 F.2d 1297, 1303-04 (8th Cir. 1982). *Consumers Power* and *Gorsuch* accorded deference to EPA's interpretation of the CWA and approved EPA's construction of the CWA as providing that pollution caused by the storage and movement of water associated with dams is not subject to NPDES permit requirements. The courts of appeals noted with approval EPA's argument that there can be no "addition" unless a source "'physically introduces a pollutant into water from the outside world.'" *Consumers*, 862 F.2d at 584, quoting *Gorsuch*, 693 F.2d at 175.

However, commencing in the late 1990s, some courts suggested that a distinction should be drawn where a water control facility transfers water between two separate bodies of water. One of those cases was *Miccosukee v. South Florida Water Management District*, 280 F.3d 1364, 1368-69 (11th Cir. 2002), *vacated and remanded*, 541 U.S. 95 (2004).[4/] Like the present case, *Miccosukee* is a citizen suit against SFWMD alleging that an NPDES permit is required for its operation of a pump within the C & SF Project, there the S-9 pump that transfers water from the C-11 canal to Water Conservation Area 3. Affirming the district court, this Court held that an NPDES permit was required. 280 F.3d 1368-69.

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[4/] *See also Catskill II*, 451 F.3d at 84; *Catskill I*, 273 F.3d at 490-92; *Dubois*, 102 F.3d at 1296-99.

3. The Supreme Court's *Miccosukee* decision. – In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), the Supreme Court granted SFWMD's petition for a writ of certiorari on the question of "'[w]hether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.'" 541 U.S. at 104. On this question, the United States, as *amicus curiae*, disagreed with SFWMD's legal position and argued that the point source itself need not be the original source of the pollutant. 541 U.S. at 104-105. The Supreme Court so held, explaining that a point source is by definition a conveyance and therefore the term includes structures that do not themselves emanate or generate pollutants. 541 U.S. at 104-105. The Court further explained that one of the CWA's primary goals was to impose NPDES permitting requirements on municipal wastewater treatment plants and that SFWMD's untenable interpretation would exclude those plants from the NPDES program. *Id*.

The United States raised, however, a different basis for reversing the judgment, arguing that, based on CWA language and structure and long-standing administrative practice, water transfers that merely transport navigable waters

from one location, through a point source, to another location are not subject to the NPDES program. Although the Court commented on this argument, the Court expressly did not decide the issue, noting that the United States' argument had not been examined in lower courts. 541 U.S. at 109. The Court instructed that this argument would be open for the parties to raise on remand. 541 U.S. at 109, 112.

Finally, the Court took it as a given that an NPDES permit is not required to convey water within a single water body, but found that further development of the factual record was necessary to resolve whether the canal and water conservation area are "meaningfully distinct water bodies." 541 U.S. at 112. Accordingly, the Court vacated this Court's judgment and remanded the case for further proceedings consistent with its opinion. 541 U.S. at 112.[5/] *Id*.

4. EPA's Articulation of its Position Following *Miccosukee*. – With respect to the statutory question of whether a water transfer is a "discharge of a pollutant" within the meaning of the CWA, the Supreme Court noted in *Miccosukee* the lack of any administrative document articulating the basis for EPA's longstanding practice of not requiring NPDES permits for water transfers. 541 U.S. at 107-108. Following the Supreme Court's decision in *Miccosukee*, on August 5, 2005, EPA issued a memorandum from the General Counsel and the Assistant Administrator

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[5/] On remand, the district court stayed the S-9 case pending resolution of this case.

for Water, entitled "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" ("Guidance"), addressing whether the movement of pollutant-containing navigable waters from one location to another by a water transfer constitutes the "addition" of a pollutant subjecting the activity to the NPDES permitting requirement. R. 369, Ex. 14. The Guidance thoroughly analyzed this question from both a legal and policy perspective, and concluded: "Based on the statute as a whole, we confirm the Agency's longstanding practice and conclude that Congress intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the [NPDES] permitting program under section 402 of the CWA." *Id*. at 3; *see also id*., pp. 8, 19.

Although recognizing that resort to case-specific evaluation of waters would not be necessary if water transfers are excluded from the NPDES permitting program, the Guidance also sets forth EPA's views as to the factors relevant to determine whether water bodies are meaningfully distinct if such evaluation were determined to be required. *See infra* at 47-49.

On June 7, 2006, EPA issued a notice of proposed rule for public comment, proposing to adopt a regulation providing that water transfers are not subject to

NPDES permit requirements.[6] Consistent with the Guidance, EPA explained that "the language, structure, and legislative history all support the conclusion that Congress did not intend to subject water transfers to the NPDES program." 71 Fed. Reg. at 32,891.

As of the filing date for this brief, EPA has not issued a final rule.

B. Factual Background.

Historically, the Everglades ecosystem extended from just south of Orlando to Florida Bay at the southern tip of the Florida mainland. As the district court found, "[i]n its natural state, the Everglades was a unified hydrologic system." R. 636, p. 18. Beginning in the mid 1800s, the State of Florida made efforts to drain the area for land reclamation. R. 636, pp. 8-9. Commencing in the early 1900s, the State began to build canals to drain the wetlands and make them suitable for cultivation. R. 636, p. 9; *see also Miccosukee*, 541 U.S. at 99. The canals proved

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[6] EPA proposed to add paragraph (i) to a list of exclusions from NPDES permitting requirements at 40 C.F.R. § 122.3, stating as follows:

> Discharges from a water transfer. Water transfer means an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants added by the water transfer activity itself to the water being transferred.

71 Fed. Reg. at 32,895.

incapable of controlling flooding and uncontrolled drainage lowered the water table resulting in salt water intrusion; fire was another unintended consequence of draining these areas. R. 636, p. 9-11; *Miccosukee*, 541 U.S. at 99-100.

In 1948, Congress established the C & SF Project to address these problems. Congress assigned the United States Army Corps of Engineers ("Corps") "the task of constructing a comprehensive network of levees, water storage areas, pumps, and canal improvements that would serve several simultaneous purposes, including flood protection, water conservation, and drainage." *Miccosukee*, 541 U.S. at 100; R. 735, TT (1/18/06), p. 80. The Project covers an area of approximately 12,000 square miles extending from just south of Orlando to Florida Bay and includes Lake Okeechobee and the EAA, a 636,000-acre area of reclaimed land located directly south of the Lake that includes part of the Lake's original lakebed and portions of northern Everglades marshes. R. 636, p. 12, 16-17. The Project includes over 1,000 miles of canals, over 1,000 miles of levees, approximately 150 structures and 15-30 pump stations. R. 636, p. 12.

The SFWMD, a State entity, is the local sponsor and day-to-day operator of the Project. R. 636, p. 12, 55-58. The Corps retains a significant role in the Project by, for example, developing the water control plan governing operation of the project as a single, comprehensive hydrologic system. R. 636, p. 13; R. 735,

TT (1/18/06), pp. 80-85. The water control plan provides operating criteria for the structures and canals within the system and information governing the regulation of the lakes and reservoirs within the system. R. 636, p. 13; R. 735, TT (1/18/06), pp. 83-90. The Corps also operates certain structures within the Project.

Lake Okeechobee, the largest freshwater lake in southeastern United States, was, and remains, the central feature of the Everglades hydrological and ecological ecosystem. R. 636, p. 13-14. Historically, the size of the Lake varied dramatically depending on season and meteorological conditions. R. 636, pp. 8, 15. During the rainy season, surface water of the Lake would rise and then glide through the Everglades to Florida Bay, at "an exceedingly slow pace" due to the nearly flat topography in a predominately southern direction through vast expanses of wetlands, sloughs, and shallow streams. R. 636, p. 18. However, on occasion, water would flow from south to north into the Lake. R. 636, p. 19.

Under the engineered system, virtually the entire Lake is enclosed by the Herbert Hoover Dike, a dam made of soil matrix, that holds water in Lake Okeechobee. R. 636, p. 15. The Lake functions as a reservoir to collect and supply water to the urban, agricultural and natural systems throughout southern Florida and to protect the surrounding communities from flooding. R. 636, pp. 14-15. In order to carry out these functions, the water level of the Lake is generally

brought to its lowest level at the end of May (during the dry season), creating excess storage capacity that may be utilized for flood control purposes during the rainy season. R. 636, p. 14-15. Water is discharged from the Lake into the EAA for this and other purposes. R. 636, p. 20. The ability to store and later release the water is also critical to avoiding saltwater incursions onto the land. R. 636, p. 15. Approximately 43 structures govern flows into and out of the Lake.

The predominate direction of gravity flow is from Lake Okeechobee to the EAA canals, and within the EAA canals themselves gravity flow is also generally from north-to-south. R. 636, p. 20. However, on very rare occasions, when the water level of the Lake is lower than the water level in the canals (which may occur during periods of drought, for example), surface water flows north into the Lake through gravity control structures located in the dike. *Id*. The Lake and the EAA canals are also hydrologically connected through seepage (movement through soil pores). R. 636, p. 22. "Although seepage generally occurs from the Lake toward the EAA, it can also flow in the opposite direction." *Id*.

The pump stations at issue are embedded in the Herbert Hoover Dike and convey water from the EAA canals to the Lake.[7] Two of the pump stations at

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[7] Created by the Corps, the canals are known as the Hillsboro, North New River, Miami, C-20, and C-21 Canals. The S-2 pump station conveys water from the Hillsboro and North New River Canals to the Lake. The S-3 pump station

issue were constructed in the 1950s and the third in the early 1970s. Pumping began in approximately 1957. Failure to operate the pump stations during severe rain events would cause flooding in communities and farmlands in the EAA. R. 636, p. 27. When Lake Okeechobee levels become too low, water is delivered from the canals to the Lake to ensure sufficient supplies of drinking water which is drawn from the Lake. *Id*. Commencing in approximately 1981, pumping from S-2 and S-3 was drastically reduced; pumping from these stations occurs only a few days per year or in some years not at all. R. 636, p. 40-41.

The water quality and physical characteristics of Lake Okeechobee vary markedly across the wide expanse of the lake. R. 636, p. 14. Lying generally north of the pump stations is the "rim canal," Lake Okeechobee's outer circumference that the Corps dredged to provide material for the Dike and to aid navigation. Water in the rim canal is generally more similar chemically to water in the EAA canals than to water in other regions of the Lake. R. 636, p. 15. In general, water in the EAA has higher levels of pollutants, particularly nutrients (phosphorus and nitrogen) and dissolved oxygen, than the Lake.

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conveys water from the Miami Canal to the Lake. The S-4 pump station conveys water from the C-20 and C-21 canals to the Lake.

Environmental impacts to Lake Okeechobee water quality from nutrients and other pollution has long been a concern. R. 636, pp. 37-39. The district court's decision describes an array of State and federal laws and plans to address these water quality issues. *Id*., pp. 39-52.

C. Proceedings and Decisions Below. – In 2002, two sets of plaintiffs[8/] commenced citizen suits against the SFWMD and its Director, alleging that the CWA requires SFWMD to obtain an NPDES permit to operate three pump stations (the S-2, S-3, and S-4) that convey water from EAA canals to Lake Okeechobee. The cases were consolidated and the Miccosukee Tribe of Indians intervened on behalf of plaintiffs. United States Sugar Corporation, an agricultural enterprise with large holdings in the EAA, intervened on the side of SFWMD. The district court stayed the case pending the Supreme Court's resolution of *Miccosukee*.

Following the Supreme Court's decision in *Miccosukee*, the United States intervened as a defendant in the case. After discovery, the parties filed cross-motions for summary judgment. The district court denied the motions without explanation and held a trial between January and April, 2006.

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[8/] Plaintiffs in one case are Friends of the Everglades and Fishermen Against Destruction of the Environment. Florida Wildlife Federation commenced the other suit.

In a December 11, 2006, opinion, the district court ruled in favor of plaintiffs on the merits, holding that NPDES permits are required for the three pump stations. The district court concluded that the CWA unambiguously requires an NPDES permit for "water transfers between distinct water bodies that result in the addition of a pollutant to the receiving water body." R. 636, pp. 73, 84. The court explained:

> "Addition" is defined as the "joining of one thing to another." Webster's Third International Dictionary Unabridged, p. 24 (1993). Although the EPA states "that it is reasonable to interpret 'addition' as not generally including the mere transfer of waters from one water of the U.S. to another," it offers no sound explanation in support of its strained definition of the term. 71 Fed. Reg. 32891. Notwithstanding Defendants' protestations to the contrary, it is evident that "addition . . . to the waters of the United States" contemplates an addition from anywhere outside of the receiving water, including from another body of water.

R. 636, p. 74, citing *Miccosukee*, 280 F.3d at 1364, and *Catskill II*, 451 F.3d at 84. The court stated that requiring permits in this situation "is consistent with the CWA goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a)." R. 636, p. 74.

The court acknowledged broader implications of its interpretation, stating that "permitting analogous activities could potentially cripple water management activities throughout the country, particularly in the West." R. 636, p. 79. The

court reasoned, however, that this case must be decided based upon the particular controversy at issue and found that the CWA policies of state primacy over allocating water and reduction of pollution are "neither inconsistent nor in conflict here." R. 636, p. 81. Because the court concluded the statute is unambiguous, it accorded no deference to EPA's contrary interpretation set forth in the 2005 Guidance and proposed regulation. R. 636, pp. 82-84.

The court then addressed whether Lake Okeechobee is meaningfully distinct from the EAA canals and concluded that it is. R. 636, pp. 84-89. The court stated that the Supreme Court's disposition in *Miccosukee* "teaches that in determining whether two waters are meaningfully distinct, a court should look beyond whether two water bodies are physically distinct at present" and that the Supreme Court called for a robust "but for" analysis. R. 636, p. 85. The court declined "to articulate a precise test for the determination of whether two bodies of water are 'meaningfully distinct.'" *Id*., p. 86. "But, at a minimum," the court stated, "the evidence must demonstrate that pollutants would not have reached the Lake were it not for backpumping, and that the Lake and the canals are distinct from one another and would remain distinct if backpumping ceased." *Id*., p. 86. The court listed the following factors as supportive of its conclusion that the Lake is meaningfully distinct from the canals:

> (1) the waters are separated by a physical barrier (the Dike); (2) historically, water generally flowed south from the Lake (in the system's natural state); (3) today, water also generally continues to flow south; (4) there are chemical differences between the Lake and the canals; (5) there are biological differences between the Lake and the canals; (6) the canals are man-made and were cut into bedrock, while the Lake is a natural bowl-shaped water body; (7) when water enters the Lake *via* backpumping, a visible plume may be observed; (8) backpumping canal water into the Lake has a negative impact upon the Lake; (9) the waters are classified differently under the CWA (the Lake is a Class I water body and the canals are Class III water bodies); and (10) the waters that are backpumped into the Lake would not otherwise reach the Lake (in any significant amount, much less in the same quantities) but for the backpumping activities. These factors demonstrate that, in the absence of an extraordinary event, backpumping is the primary means by which pollutants from one body of water (the canals) enter another, distinct body of water (the Lake).

*Id.*, pp. 86-87.

The court found the hydrological connection between the canals and the Lake (with or without pumping) "relevant," but not determinative, reasoning that *Miccosukee* indicated that the "proper question is whether the bodies of water are '*meaningfully* distinct,' not 'completely distinct'" and "[a]ll bodies of water are to some extent, hydrologically connected." *Id*., p. 87 (emphasis in original). The court also stated that historically, the Lake and waters to the south of the Lake were distinct notwithstanding the unknown and undefined boundary between the Lake and marshlands to the south. *Id*., p. 88.

In an order entered June 15, 2007, the court issued an injunction requiring SFWMD to apply for an NPDES permit, but denied plaintiffs' requests to set deadlines for compliance or for issuance of a permit or to hold additional hearings regarding interim relief. R. 692.

## SUMMARY OF ARGUMENT

The CWA does not require the SFWMD to obtain an NPDES permit for its S-2, S-3, and S-4 pumping facilities, which merely convey on infrequent occasions navigable waters, unaltered, from EAA canals to Lake Okeechobee for flood control and water supply purposes. The district court erred in concluding, based on the statutory definition of "discharge of a pollutant," 33 U.S.C. § 1362(12), that the CWA unambiguously requires an NPDES permit for water transfers. To the contrary, read as a whole, the statutory language and structure of the Clean Water Act indicate that Congress did not generally intend to subject water transfers to the NPDES program and the statutory definition of "discharge of a pollutant" itself supports that conclusion. Rather, Congress contemplated that water quality issues arising from water transfers would be addressed through federal and state mechanisms other than the NPDES permitting program. EPA's interpretation of the CWA set forth in the Guidance and notice of proposed

rulemaking is entitled to *Chevron* deference or, at the very least, a high degree of deference under *Skidmore*.

Assuming *arguendo* that the CWA requires an NPDES permit for water transfers, a permit is not required for the facilities here because the canals and Lake Okeechobee are not meaningfully distinct water bodies. The district court's conclusion that they are is erroneous as a matter of law because the court failed to consider or to accord appropriate weight to relevant factors, especially the hydrologic connections between these waters and congressional understanding that this a unified water system.

## ARGUMENT

### I. The District Court Erred in Holding That the Statute Subjects Water Transfers to the NPDES Program

A. Standard of Review. – The applicability of the NPDES program to water transfers presents an issue of statutory interpretation reviewed *de novo* by the court of appeals applying well established principles of statutory interpretation. *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999). If a statute speaks clearly "'to the precise question at issue,'" the reviewing court "'must give effect to the unambiguously expressed intent of Congress.'" *Barnhart v. Walton*, 535 U.S. 212, 217 (2002), quoting *Chevron U.S.A. Inc. v. Natural Resources*

*Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). In determining whether Congress has unambiguously spoken to the precise question at issue, the court should "look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *accord Legal Environmental Assistance Foundation, Inc. v. United States Environmental Protection Agency*, 276 F.3d 1253, 1258 (11th Cir. 2001).

If, however, the statute is "'silent or ambiguous with respect to the specific issue,'" the court must accord deference to the agency's interpretation if it is "'based on a permissible construction'" of the Act. *Barnhart*, 535 U.S. at 218, quoting *Chevron*, 467 U.S. at 843. *See also Nat'l Assoc. of Homebuilders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2534 (2007); *Sierra Club v. Leavitt*, 488 F. 3d 904, 911-12 (11th Cir. 2007); *Stroup v. Barnhart*, 327 F.3d 1258, 1261 (11th Cir. 2003).

An agency interpretation expressed in an agency's exercise of delegated rule-making authority is "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."[9] *United*

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[9] Congress has expressly authorized EPA to prescribe regulations as are necessary to administer the CWA. *See* 33 U.S.C. § 1361(a). Moreover, as the agency that is charged with administering the CWA in general and NPDES program in particular, Congress has implicitly delegated to EPA authority to interpret ambiguities or gaps in the statutory language pertaining to the NPDES program.

*States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Interpretations expressed in other forms also may qualify for *Chevron* deference. *See Barnhart*, 535 U.S. at 221-222; *Mead*, 533 U.S. at 235. Even where an administrative interpretation is not in a form that qualifies for *Chevron* deference, an agency's permissible interpretation of a statute it administers nonetheless deserves deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Mead*, 533 U.S. at 227, 235; *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 487-88 (2004).

B. The CWA Does Not Require an NPDES Permit for Water Transfers. – The starting point for all statutory interpretation is the language of the statute itself. *See, e.g., Watt v. Alaska*, 451 U.S. 259, 265 (1981); *United States v. DBB, Inc.*, 180 F.3d at 1281. The reviewing court should not look at one word or term in isolation, but instead look to the entire statutory context. *Id.*; *United States v. McLemore*, 28 F.3d 1160, 1162 (11th Cir.1994). A statute is ambiguous if it is "'capable of being understood in two or more possible senses or ways.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 91 (2001) (quoting *Webster's Ninth New Collegiate Dictionary* 77 (1995 ed.)).

The district court held that the statutory definition of "'discharge of a pollutant,'" 33 U.S.C. § 1362(12), unambiguously demonstrates that an NPDES

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*See Nat'l Cable & Tele. Ass'n v. BrandX Internet*, 545 U.S. 967, 980 (2005).

permit is required for a water transfer that delivers pollutants to the receiving water. The district court rested that conclusion on its perception of the plain meaning of "addition," asserting that "it is evident that 'addition to the waters of the United States' contemplates an addition from anywhere outside of the receiving water, including from another body of water."[10/] R. 636, p. 74.

The district court erred in concluding that the CWA requires NPDES permits for water transfers. In fact, a straightforward reading of the statute leads to precisely the opposite conclusion. The statute defines "'discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). When the statutory definition of "'navigable waters'" – *i.e.*, "the waters of the United States," 33 U.S.C. § 1362(7) – is inserted in place of "navigable waters," the statute provides that NPDES applies only to the "*addition* of any pollutant *to the waters* of the United States." Given the broad definition of "pollutant," transferred (and receiving) water will always contain intrinsic pollutants, but the pollutants in transferred water are already *in* "the waters of the United States" before, during, and after the water transfer. Thus,

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[10/] As support, the court cited the vacated court of appeals opinion in *Miccosukee*, 280 F.3d at 1368. R. 636, p. 74. Because that decision was vacated, however, it has no precedential effect. *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979). Furthermore, as the Supreme Court observed, the United States' argument was not presented to this Court. 541 U.S. at 109.

there is no "addition"; nothing is being added "*to*" "the waters of the United States" by virtue of the water transfer, because the pollutant at issue is already part of "the waters of the United States" to begin with. Stated differently, when a pollutant is conveyed along with, and already subsumed entirely within, navigable waters and the water is not diverted for an intervening use, the water never loses its status as "waters of the United States," and thus nothing is added to those waters from the outside world.

Other textual indications support this reading of the text. The statutory definition of "'discharge of a pollutant'" is "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12). The absence of the modifier "any" before "navigable waters" in conjunction with inclusion of the article "the" in the statutory definition of "navigable wasters" as "*the* waters of the United States" supports the conclusion that "navigable waters" should be viewed as a whole for purposes of the NPDES program. If Congress had instead intended to mandate the result reached by the district court, it could easily have provided that an addition to "*any* navigable waters" would qualify. Indeed, Congress used precisely that formulation in other portions of the CWA where it intended to regulate on a water-by-water basis. 33 U.S.C. §§ 1254(a)(3), 1314(f)(2)(F). It did *not* do so in the NPDES context. "Where Congress includes particular language in

one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan v. Walker*, 533 U.S. 167, 173-174 (2001) (citation and internal punctuation omitted).

Even though the CWA provides no definition of "addition" or "addition . . .to," the district court inexplicably jumped to the conclusion that "addition" in this context necessarily refers to the introduction of pollutants from outside the particular receiving water. Courts of appeals have reached the opposite conclusion, holding that the definition of "discharge of a pollutant" is reasonably interpreted to mean that "an addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world." *Gorsuch*, 693 F.2d at 175. *Accord Consumers Power*, 862 F.2d at 584. Neither the word "addition" nor any other language within the definition of "discharge of a pollutant" suggests that the "outside world" must be qualified to mean "anywhere outside of the receiving water, including from another body of water," R. 636, p. 74. The court in *Gorsuch* did not have that understanding, because it described the polluted water as passing from "one body of water" to "another," yet it held that no "addition" occurred. 693 F.2d at 175; *see also* 693 F.2d at 165.

In *Miccosukee*, the Supreme Court did not reject the United States' straightforward reading of "discharge of a pollutant" or suggest that the language of the statutory definition is incapable of such reading. The Court did suggest that other CWA provisions "might be read" to suggest a contrary reading. 541 U.S. at 107. Specifically, the Supreme Court identified provisions providing for States to set water quality standards consisting of "the designated uses of *the navigable waters involved* and the water quality criteria for such waters" 33 U.S.C. § 1313(c)(2)(A) (emphasis added), and total maximum daily loads for a given "water body," 33 U.S.C. § 1313(d). *See* 541 U.S. at 107.[11/] The Court states that "[t]his approach suggests that the Act protects individual water bodies as well as the 'waters of the United States' as a whole." *Id*.

The provisions cited by the Court do generally regulate at the level of individual water bodies or parts of water bodies, but it does not follow that the same must be true of the NPDES program. The CWA includes an array of

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[11/] Although the Supreme Court referred to these as "NPDES provisions," they are not found in § 402 and are not part of the NPDES program, per se. Effluent limitations in an NPDES permit may be based on water quality standards, but the requirement to set water quality standards or total maximum daily loads (TMDLs) exists independent of the NPDES program and has applicability even when an NPDES permit is not required. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1125-133 (9th Cir. 2002) (upholding EPA's authority to impose TMDLs for waters polluted only by nonpoint sources).

regulatory approaches aimed at improving water quality, of which the NPDES program is only one, and Congress intended for water transfers to be regulated by other means. *See infra* at 31-36; 33 U.S.C. § 1314(f)(2)(F). The fact that Congress used different language in different parts of the CWA to define the scope of particular regulatory tools suggests that when Congress intended to require regulation at the level of individual water bodies or parts thereof, it did so expressly. *See, e.g.,* 33 U.S.C. § 1312(a) ("a specific portion of the navigable waters"); § 1313(c)(2)(A) ("the navigable waters involved" and "such waters"); 1313(d)(1)(B) ("those waters or parts thereof"); § 1254(a)(3) ("any navigable waters"), § 1314(f)(2)(F) (same). Congress's reference to "the waters of the United States" as a whole in the NPDES context indicates that Congress intended a different approach in that context.

Finally, as explained *infra* at 53-55, water quality standards are not set coextensive with commonly understood boundaries of "water bodies." Different portions of the same water body may have different water quality standards. Thus, the provisions respecting water quality standards do not support the distinction the district court and other courts have drawn between transfers from one water body to another and transfers within the same water body.

In sum, the district court erred in holding that the plain language of "discharge of a pollutant" dictates that an NPDES permit be required for a water transfer. The statutory definition of "discharge of a pollutant" instead supports the conclusion that water transfers are not generally subject to the NPDES program because they do not entail the "addition" of pollutants "to the waters of the United States."

C. Read as a Whole, the Clean Water Act Supports EPA's Position That Water Transfers Do Not Require NPDES Permits. – The district court reasoned that its interpretation of the statutory definition is supported by the structure and purpose of the CWA. However, as explained above, the court misconstrued the language of the statutory definition and, furthermore, no other statutory language or indicia of congressional intent compels the court's reading. To the contrary, when the statute is read as a whole, its structure and purpose support EPA's conclusion that Congress did not intend that, as a general matter, water transfers be subject to the NPDES program.

Under well settled principles, the phrase "addition * * * to navigable waters" should not be read in isolation from the remainder of the statute. As the Supreme Court has explained:

> The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

*Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006)*; see also United States Nat'l. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993).

CWA § 101(g) directs EPA to work with State and local agencies to develop "comprehensive solutions" to water pollution problems "in concert with programs for managing water resources." 33 U.S.C. § 1251(g). The CWA distinguishes between point sources subject to §§ 402 or 404 and facilities not subject to those sections, referred to as nonpoint sources. CWA § 304(f) expressly includes water management activities in the context of addressing nonpoint sources of pollution. This section directs EPA to issue guidelines for identifying and evaluating the nature and extent of "nonpoint sources of pollutants" as well as provide federal, State, and area-wide planning agencies with information on "processes, procedures, and methods to control pollution from," among other things, "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f).

The Supreme Court pointed out in *Miccosukee*, 541 U.S. at 106, that mere mention of an activity in § 304(f) as a nonpoint source of pollution does not preclude it from also being a point source. Nonetheless, § 304(f) is focused primarily on addressing pollution sources outside the scope of the NPDES program and "reflects an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program." 71 Fed. Reg. at 32,890. *See* H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 109 *reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972*, Volume I at 796 (Comm. Print 1973) ("[t]his section * * * on * * * nonpoint sources is among the most important in the 1972 Amendments").

As EPA explains in its notice of proposed rulemaking, Sections 304(f) and 101(g)

> together demonstrate that Congress was aware that there might be pollution associated with water management activities, but chose to defer to comprehensive solutions developed by State and local agencies for controlling such pollution. Because the NPDES program only focuses on water pollution from point source discharges, it is not the kind of comprehensive program that Congress believed was best suited to addressing pollution that may be associated with water transfers.

71 Fed. Reg. at 32,890.

This conclusion is supported by the structure of the Act. The Act's structure reflects Congress's general intention that water pollution be controlled at the source whenever possible. *See* S. Rep. No. 92-414, 92 Cong., 2d Sess. 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742 (justifying a broad definition of navigable waters because it is "essential that discharge of pollutants be controlled at the source"). The CWA's NPDES program typically imposes limitations on a point source discharge by establishing permissible rates, concentrations, or quantities of specified constituents at the point where the discharge stream enters the waters of the United States. Discharges of pollutants covered by § 402 are subject to "effluent limitations," with effluent understood as encompassing discharges from, among other things, industrial, commercial or municipal operations. Water transfers are unlike these types of discharges in significant respects. Water transfers involve water that never loses its status as "waters of the United States," and thus are different from discharges of effluent from industrial, commercial, or municipal water treatment facilities. Unlike operators of the latter facilities, the operators of water-transfer facilities do not create or control the runoff or flow of pollutants into waters, and thus are not responsible for the presence of pollutants in the waters they transport. Rather, pollutants enter the

waters of the United States from point and nonpoint sources often located far away and beyond control of the operator of the water transfer facility.

Although water pumps unquestionably are "point sources," the pollutants in transferred waters are analogous to nonpoint source pollutants that Congress contemplated would be addressed through water resource planning and State land use regulations, which attack the problems of pollution associated with water movement and nonpoint sources at their source. *See, e.g.*, 33 U.S.C. § 1288(b)(2)(F) (land use planning to reduce agricultural nonpoint sources of pollution); 1329 (nonpoint source management programs); § 1314(f) (issuance of guidelines and methods to control nonpoint sources, including changes in water movement or flow); § 1341(a) (state certification of federally licensed projects).[12/] Sections 1288, 1314(f), and 1329 encourage the States to develop local programs, that may include techniques such as land use requirements or best management

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[12/] In holding that a federal licensee for a hydropower project must obtain a state water quality certification for discharges from its facility pursuant to CWA § 401(a), 33 U.S.C. § 1341, the Supreme Court in *S.D. Warren v. Maine Board of Envt'l Protection*, 126 S. Ct. 1843, 1853 (2006), explained that "changes in the river [resulting from discharges through a dam] like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns." *Id*. at 1853, citing, *inter alia*, 33 U.S.C. §§ 1251(b) ("'It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution'") and § 1256(a) (federal funds for state efforts to prevent pollution).

practices to control sources of pollution. Congress directed federal agencies to cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

The district court reasoned that requiring an NPDES permit for water transfers is consistent with the CWA's purpose of protecting water quality. R. 636, p. 74. However, that purpose is not defeated by the absence of NPDES permitting for transfers because the NPDES program is not the only means of effectuating the CWA's water quality protection purpose. The CWA is structured to attain the Act's goals of protecting water quality and preserving state management of water quantity through a variety of programs and regulatory initiatives in addition to the NPDES program. Myriad regulatory programs under both federal and state law govern the water quality of water delivery and diversion facilities. For example, within the framework of various CWA-established programs, states may develop pollution reduction plans for bringing navigable waters that do not currently meet water quality standards into attainment with those standards. *See, e.g.*, 33 U.S.C. § 1313(d); *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 172-73 (Cal. Ct. App. 1986) (reviewing water quality standards for salinity control in connection with state permit for water

diversion projects issued under state management plan). *See also* R. 369, Ex. 14, pp. 25, 91-92, 162-163 (discussing nonpoint source management programs funded in part under CWA, 33 U.S.C. §§ 1288, 1329). There are also state and federal statutes and programs that specifically address water quality issues in the Everglades. *See* R. 636, pp. 42-52.

The CWA states Congressional policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b). Congress also expressly stated its intent that the CWA be construed in a manner that does not unduly interfere with the ability of States to allocate water within their boundaries. CWA Section 101(g) provides:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the Act]. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g). *See also* 33 U.S.C. § 1370 ("Except as expressly provided in this Chapter, nothing in this Chapter shall * * * be construed as impairing or in

any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States").

Although the water transfer in this case is located in South Florida for the primary purpose of flood control, most water transfers occur in the western states to transfer water for consumptive use or irrigation.[13] *See* 71 Fed. Reg. at 32,888-89; R. 636, pp. 55, 79. Thus, in many instances water transfers are for the purpose of effecting water allocation decisions made by States. There are thousands of water transfers in the United States and many large cities would not have adequate sources of water for their citizens were it not for water transfers.[14] Congress would not have extended NPDES permitting requirements to potentially thousands of water diversion facilities with the potential consequence of reallocating water with significant consequences without any acknowledgment of that intention.

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[13] Water transfers can be relatively simple, moving a small quantity of water a short distance on the same stream, or very complex, transporting substantial quantities of water over long distances, across state and basin boundaries. 71 Fed. Reg. at 32,888.

[14] While observing that "permitting analogous activities could potentially cripple water management activities throughout the country," the district court suggested it would be inappropriate for it to consider the potential impact on water transfers in western states in determining the proper statutory interpretation. R. 636, pp. 79-80. To the contrary, particularly where, as here, this is an issue of first impression in this Circuit, it is appropriate for the reviewing court to consider the impact of the rule of law it announces beyond the immediate controversy.

Citing *Miccosukee*, 541 U.S. at 108, the district court suggests that defendants here failed to demonstrate that the pumping is allocative in nature or that as a general matter subjecting water transfers to NPDES permitting would prohibitively raise a state's costs of water distribution. R. 636, pp. 79-80. The passage in *Miccosukee* on which the district court relied for this analysis states:

> It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. § 1251(g). On the other hand, it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs.

541 U.S. at 108. This passage provides no support whatsoever for the district court's ultimate conclusion that the CWA unambiguously requires NPDES permits for water transfers. This dicta also does not, as the district court suggests, impose an evidentiary burden concerning the effect on allocation or related costs that defendants or EPA must satisfy to avoid the imposition of an NPDES permit requirement for a water transfer. Rather, the dicta suggests some tension due to the competing purposes in the Act having the flavor of policy judgment that Congress ordinarily expects, and entrusts, the administering agencies to undertake, not the courts. Thus, EPA's judgment on this issue, based on its expertise and

balancing of CWA policies, that generally requiring NPDES permits for water transfers could unnecessarily interfere with State decisions on water rights is entitled to substantial deference. *See* 71 Fed. Reg. at 32,890.

Finally, as laid out in EPA's proposed rule, the CWA legislative history underscores Congress's intent not to subvert state water allocation systems and to work in concert with state water management systems and discussing water flow management activities only in the context of the nonpoint source program. 71 Fed. Reg. at 32,891.

D. EPA's Interpretation is Entitled to Deference. – In *Miccosukee* the Supreme Court expressed reluctance to accord deference to the United States' position due to the absence of administrative documents articulating the basis for EPA's long-standing practice of not issuing NPDES for water transfers. 541 U.S. at 107; *see also*, *Miccosukee*, 280 F.3d at 1368 n.4 (this Court stating it could ascertain no EPA position to which to give deference). Following the Supreme Court's decision in *Miccosukee*, EPA explicitly articulated its longstanding interpretation of the CWA in the Guidance and notice of proposed rulemaking and thoroughly explained the basis for its conclusion that water transfers are not

subject to NPDES permitting requirements.[15/] These documents remove any reason to withhold deference to EPA's interpretation based on the absence of a clearly articulated administrative position.

The interpretation set forth in these documents is entitled to *Chevron* deference. The nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the consistency of EPA's practice over a long period of time all indicate that *Chevron* deference is appropriate. *See Barnhart*, 535 U.S. at 22; *Mead*, 533 U.S. at 230-31. Even if these documents do not qualify for dispositive *Chevron* deference because they are not the product of complete notice

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[15/] In *Miccosukee*, the Supreme Court noted that some amici argued that an EPA General Counsel opinion had interpreted the CWA to require NPDES permits for water transfers, citing *In re Riverside Irrigation Dist*., 1975 WL 23864 (Ofc. Gen. Coun., June 27, 1975). 541 U.S. at 107. This General Counsel opinion did not, however, specifically address whether an "addition to navigable waters" has occurred when a navigable water is conveyed to another navigable water. Rather, the opinion addressed whether an irrigation return flow is a properly permittable "point source" within the meaning of §§ 301 and 402 of the CWA. *Riverside*, 1975 WL 23864 at *1. While the opinion answered that question in the affirmative, CWA amendments in 1977 and EPA's regulations implementing the Act exempted return flows from irrigated agriculture from regulation under the CWA. *See* 33 U.S.C. §§ 1342(l)(1), 1362(14), 40 C.F.R. § 122.3(f). Moreover, to the extent that *Riverside* conflicts with the interpretation with respect to water transfers set forth in the 2005 Guidance, it is expressly superseded. R. 636, Ex. 14, p. 3.

and comment rulemaking, they are entitled to a high degree of deference under *Skidmore* based on similar factors. *See Wilderness Watch v. Mainella*, 375 F.3d 1085, 1091 n.7 (11th Cir. 2004). "Under *Skidmore*, the degree of deference accorded an agency's interpretation depends upon the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Buckner v. Florida Habilitation Network, Inc.*, 489 F.3d 1151, 1155 (11th Cir. 2007) (quoting *Skidmore*, 323 U.S. at 140); *see also Mead*, 533 U.S. at 228.

EPA's interpretation of the statute in these pronouncements speaks directly and clearly to the issue at hand and is consistent with long-standing practice. The Supreme Court in *Miccosukee* mistakenly suggested that the United States' position "could" conflict with EPA regulations regarding intake credits when industrial users withdraw pollutant-containing waters from a body of water for use and later discharge the water back into navigable waters. 541 U.S. at 107-08, citing 40 C.F.R. § 122.45(g)(4). Noting that intake credits are available only when the used water is discharged back into the same body of water from which it came, the Court suggested that the NPDES program "thus appears to address the movement of pollutants among water bodies, at least at times." 541 U.S. at 108.

As EPA has explained, however, there is no inconsistency between these regulations and EPA's conclusion that water transfers generally are not subject to NPDES requirements: When "water is *withdrawn from navigable waters* for an intervening industrial, municipal or commercial use, the reintroduction of that intake water and associated pollutants physically introduces pollutants *from the outside world into navigable waters* and, therefore, is an 'addition' subject to NPDES permitting requirements." 71 Fed. Reg. at 32,892 (emphases added). Water that is withdrawn from a water body for industrial, municipal, or commercial use loses its status as "navigable waters" and instead becomes part of "the outside world." Reintroduction of that water (and its intrinsic pollutants) "from the outside world" therefore constitutes an "addition" to which NPDES requirements apply. The same is not true of water transfers, which EPA limits to the "convey[ance] [of] waters of the United States to another water of the United States *without* subjecting the water to intervening industrial, municipal, or commercial use." *Id*. at 32,891 (emphasis added). Thus, EPA's position is entirely consistent.

Moreover, as explained in the notice of proposed rulemaking, it has been the EPA's longstanding practice – and the practice of nearly every state that administers an NPDES program – not to require NPDES permits for water

transfers. 71 Fed. Reg. at 32,889. Although 45 States now administer the NPDES program, EPA is aware of only one State – Pennsylvania – that has a practice of issuing such permits. *Id* at n.1.

The agency's interpretation set forth in the Guidance and notice of proposed rulemaking is thorough and logical. Its analysis considers the statute as a whole, its structure, the legislative history, and relevant case law. EPA's interpretation is also the product of, and reflects EPA's expertise in, administering the CWA in general and the NPDES program in particular. The complexity of the NPDES program and of expanding the program to require an NPDEs permit for every engineered diversion of water from navigable water into another, is yet another reason to defer to EPA's interpretation. *See Barnhart*, 535 U.S. at 222; *Gorsuch*, 693 F.2d at 167 (according deference to EPA's position that dams generally do not require NPDES permits); *Consumers Power*, 862 F.2d at 585 (same). Finally, for reasons explained in Sections B and C above, EPA's interpretation set forth in the Guidance and notice of proposed rulemaking is, at a minimum, a permissible and persuasive interpretation of the Act.

## II. The EAA Canals and Lake Okeechobee Are Not "Meaningfully Distinct" Waters for Purposes of NPDES Applicability

A. Standard of Review. – Assuming *arguendo* that an NPDES permit is required for water transfers from one water body to another, there remains the question of whether the waters at issue here are "meaningfully distinct water bodies." The question whether waters are "meaningfully distinct" so as to require an NPDES permit for a transfer from one to the other is a mixed question of law and fact. As such, the determination is subject to *de novo* review by the court of appeals with the district court's factual findings reviewed for clear error and its application of the law to the facts reviewed *de novo*. *CP v. Leon County School Bd. Florida*, 483 F.3d 1151, 1155-56 (11th Cir. 2007). Here, the district court erred as a matter of law.

B. The 2005 EPA Guidance sets forth relevant and appropriate factors to consider in determining whether waters are "meaningfully distinct." – The district court stated that it would not articulate a precise legal test for the determination of whether water bodies are meaningfully distinct, "[b]ut at a minimum, the evidence must demonstrate that pollutants would not have reached the Lake were it not for backpumping, and that the Lake and canals are * * * and would remain distinct if

backpumping ceased." R. 636, p. 86. The court also stated that it based its decision on consideration of ten specified factors.

The purported minimal standard is not, however, met here. In the absence of pumping, waters from the canals (including pollutants contained within the water) reach the Lake through seepage and groundwater and, on occasion, from gravitational surface flow.[16/] At any rate, as the district court correctly suggested, satisfaction of a "but for" test is not sufficient by itself to conclude that water bodies are meaningfully distinct.[17/]

Although the Supreme Court expressly declined in *Miccosukee* to decide whether a "but for" test is an appropriate standard, the Court implicitly rejected

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[16/] In the tenth factor, the district court suggests a gloss to the minimal standard by finding that the waters backpumped into the Lake would not otherwise reach the Lake "in any significant amount" or in "the same quantities." R. 636, p. 87. Because the purpose of most water transfers is to change the quantity of water in a given location at a given time from the quantity that would occur at that time and place in the absence of the transfer, a "same quantity" test provides no reasonable limit.

[17/] Although the phrase "from" a point source in the statutory definition of "discharge of a pollutant" does not mean that the point source itself must generate the pollutant, 541 U.S. at 105, the word "from" is not properly interpreted at the other extreme to justify a "but for" test. The apt definition of "from" in the context of a point source connotes a physical relationship such as "a point or place where an actual physical movement * * * has its beginning." *Webster's Third New International Dictionary* 913 (1993). The pumping stations do not physically add anything to water; they merely convey or connect waters which already contain pollutants.

such a standard or an ordinary natural flow standard because it recognized that the pumping at issue in that case was uphill or against the usual natural flow, but nonetheless did not consider that the end of the inquiry. *See Miccosukee*, 451 U.S. at 111 ("The District Court certainly was correct to characterize the flow through the S-9 pump station as a nonnatural one, propelled as it is by diesel-fired motors against the pull of gravity. And it also appears true that if S-9 were shut down, the water in the C-11 canal might for a brief time flow *east*, rather than west, as it now does") (emphasis in original)). Instead, the Court discussed other broad factors such as common underlying aquifer, seepage and sub-surface flow between the waters, and the long-term effects if pumping were ceased. 451 U.S. at 110-12.

Consistent with the Supreme Court's approach in *Miccosukee*, EPA's 2005 Guidance sets forth factors relevant to applying the term "meaningfully distinct." As explained in Section I.D above, the Guidance should be accorded deference. The Guidance explains that "[t]he term 'meaningfully distinct' suggests a two-part test for deciding whether a water transfer might constitute an addition: (1) the waters must be distinct, and (2) the distinction must be meaningful." R. 369, Ex. 14, p. 15.

To determine whether waters are distinct, EPA instructed that the full range of hydrologic connections be considered, both natural and manmade. *Id*. EPA

explained that Congress recognized that man-made activities have altered the hydrologic landscape and that the statute applies to all waters meeting statutory and regulatory definitions of navigable waters regardless of whether human activity may have contributed to making the water what it is today. *Id*. The Guidance continues:

> Thus, where two waters have been or are hydrologically connected, through human activity or otherwise, this factor strongly supports the conclusion that they are not "distinct." In some cases, the waters may have a history of having been integrated or they may have become integrated through natural changes or human activity over time. In either case, the connection has integrated the waters and they are logically not "distinct."

*Id*., p. 16.

The Guidance further states that waters are not distinct simply because they have been connected by a conveyance that moves water against the gradient via a pump. *Id*., p. 16. Also relevant here, the Guidance instructs:

> It would not make sense to ignore, as have some of the appellate court decisions, the water transfer itself in deciding whether two waters are distinct. In some cases * * * the transfers have been going on for decades and even predate enactment of the CWA. * * * Where two navigable waters are connected by a water transfer, they have become closely intertwined in the hydrological landscape and may even be considered part of the same tributary system. The length of time that the connection has been in place could be relevant to determining whether the waters are distinct.

*Id*.

If waters are found "distinct" based on such factors, the question remains whether that distinction is meaningful. *Id*. EPA instructs that it is appropriate to consider existing laws, regulations or programs and the specific context of the transfer. *Id*. at 17-18.

C. The district court erred as a matter of law by failing to consider or weigh properly relevant factors. – The district court's approach of considering and weighing multiple relevant factors to determine whether waters are meaningfully distinct is legally appropriate. However, the district court erred as a matter of law by failing to consider relevant factors, or by attaching improper weight to factors it did consider.

1. The waters are not distinct due to the direct hydrologic connections. – Although the district court purported to accord some consideration to the historical and current hydrologic connection of the waters, it erred by failing to consider the full breadth of relevant hydrologic conditions when rendering its legal conclusion. As the district court found, "[i]n its natural state, the Everglades was a unified hydrologic system." R. 636, p. 18. As an expert for the plaintiffs testified, "the Everglades made the lake and the lake made the Everglades." R. 730, TT (1/10/06), pp 140-41. Both historically and after creation of the C & SF Project, there is intermingling of the waters of the Lake and waters to the south; water from

the EAA canals reaches Lake Okeechobee with or without pumping via surface water flow, seepage and sub-surface flow. R. 636, pp. 19, 20-21.

The district court recognized the historic and current hydrologic connections and acknowledged that the waters here are not "completely distinct." R. 636, p. 87. The court reasoned that this did not, however, end the inquiry because, according to the court, all water bodies are to some extent hydrologically connected and the question is whether the water bodies are "meaningfully distinct," not "completely distinct." R. 636, pp. 87-88. The district court analogized the facts of this case to *Dubois*, 102 F.3d at 1298, where water would be pumped from a river uphill to a pond that was in the same watershed. *Id*., p. 88. *Dubois* rejected an argument that no NPDES permit was required in that circumstance because water in the pond flowed downhill, eventually into the river. 102 F.3d at 1298.

The court's reasoning does not withstand scrutiny. First, the court's comment that all water bodies are hydrologically connected is not supported. *Cf. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (holding that isolated pond not connected to traditionally navigable waters is not subject to CWA permitting jurisdiction). More importantly, even if it is true that all water bodies are hydrologically

connected in some general sense, the proper inquiry here is whether the particular waters at issue are connected in some reasonably direct way.

Second, in contrast to the attenuated hydrologic connection in *Dubois*, the proximity and connections between the waters at issue here are close and direct. In *Dubois*, although the donor water (a river) and the receiving water (a pond) were part of the same watershed and connected in that sense, the pond was located up a mountainside from the river.[18/] Here, as the district court found, the waters in the canals and Lake directly intermingle both historically and after manmade changes. R. 636, p. 20. The waters historically were part of a unified hydrologic system and surface and ground water flowed between the Lake and marshes in both directions.[19/] As modified, the waters of the Lake and canal are separated

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[18/] In *Catskill*, the donor water body "would never reach" the receiving water body in the absence of manmade diversion and pumping. *See Catskill I*, 273 F.3d at 484, 492.

[19/] Although historically the open water Lake had a name that differentiated it from the adjacent wetlands to the south (now the EAA), in other CWA contexts wetlands are not treated as water bodies wholly separate from the open water body to which they are adjacent. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-35 (1985). Furthermore, the Lake underwent dramatic changes in size and at times extended into the area that is now part of the EAA canals from where water is pumped. R. 636, pp. 7-8, 15. In short, contrary to the district court's suggestion, the "undefined boundary between the Lake and marshlands to the south of the Lake" is a relevant factor that supports a different result. R. 636, p. 88.

only by the dike (a distance of about 60 feet) and water flows through the dike in both directions, that is, from the Lake to the EAA and vice-versa. R. 636, p. 20-22; *supra* at 13-16.

Pumping from the canals to the Lake has gone on for decades, since long before enactment of the CWA in 1972. The Flood Control Act of 1948 authorized the reconstruction of the dike containing Lake Okeechobee and the S-2, S-3, and S-4 pump stations. *See infra* at 57-59. The S-2, S-3, and S-4 pump stations have conveyed water from the EAA canals to Lake Okeechobee since approximately 1957, 1958, and 1975, respectively.[20/] Without this pumping, there would be flooding of long-established communities and farmlands and potential shortfalls of water supply for domestic and commercial use. R. 636, p. 27; R. 737; TT (Jan. 20, 2006), pp. 136-37. There are currently no options for alternative diversions to move the water and avoid flooding.[21/] *Id*.

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[20/] The long duration of this practice provides yet another reason to distinguish this case from *Dubois* because that case involved a proposal for an entirely new water transfer to facilitate snow-making at a ski resort. 102 F.3d at 1279. *See* R. 369, Ex. 14, p. 16.

[21/] The Supreme Court in *Miccosukee* suggested that an appropriate consideration is what would happen if pumping were shut down. 541 U.S. at 111. Plaintiffs failed to present any evidence addressing this factor and without such evidence, the only reasonable inference is that the flooding of the EAA would intensify the hydrological connection between that area and the Lake.

Furthermore, the pumping operations at issue here are just one of a multitude of operations within the integrated water system. Changes in operations of any one part of the C & SF necessarily impact other parts and operations of the system. *See* R. 734, TT (1/17/2006), pp. 3-10; TT (1/20/2006), p. 2-8; R. 738,TT. (1/25/2006), pp. 3-5. In fact, the right quantity, quality, timing, and distribution of water throughout the ecosystem is the very premise and core tenet of plans for restoring it. In short, as modified by the C & SF Project, the Everglades remain "a unified hydrologic system."

2. The fact that the waters are classified for different uses under the CWA does not, by itself, signify that they are meaningfully distinct water bodies. – The district court here listed as one factor supporting the conclusion that the waters are meaningfully distinct, the fact that the Lake and EAA canals have different water classifications. R. 636, p. 87. (The State of Florida classifies Lake Okeechobee as a Class I designated use and the EAA canals as Class III.) The geographic reach of any given water quality standard cannot, however, be a definitive test for delineating the geographic bounds of water bodies for purposes of the applicability of a NPDES permit for a water transfer.

CWA § 303(c)(2)(A) provides that States may set water standards by taking into consideration "the designated uses of the navigable waters involved." 33

U.S.C. § 1313(c)(2)(A). A water quality standard is defined in part by the use to which the water is put, which often can be a function of the surrounding land use. The classification does not necessarily signify a difference in its biological, chemical, or physical characteristics.

More importantly, the CWA allows water quality standards to differ from one "part[]" of a navigable water to another. 33 U.S.C. § 1313(d)(1)(B). Thus, a single water body may have different classifications in different segments even though there is no physical boundary or barrier marking the dividing point between the classifications. R. 636, p. 35 n.36. Rivers, for example, may be Class I in one section and Class III water in another section. *Id*. A reservoir behind a dam may be classified differently than the water flowing from the discharge point below the dam, but the discharge does not require NPDES permits. *See supra* at 7, 56. In Florida, water classifications can change based on administrative action and do not appear linked to whether the water is a single water body or not. *See* Fla. Admin. Code § 62-302.

In *Miccosukee*, the Supreme Court assumed that an NPDES permit is not required for water transfers within the same water body. 451 U.S. at 109. And no court has held otherwise. Because water bodies may have more than one

classification and classifications depend on use, reliance on classifications to define whether waters are distinct contravenes this basic premise.[22/]

3. The district court's approach is flawed. – Many of the factors that the district court included in its analysis of the distinction between the Lake and the EAA canals prove too much, because they depend so heavily on the consequences of pumping, rather than a simple analysis of the relationship between the Lake and the canals. The conceptual flaw in the district court's reasoning is evident when its ten factors are applied to two points in a river, or even two points in Lake Okeechobee itself. If water from a river were, for whatever reason, pumped from point B and released back into the river at upstream point A, that situation could still satisfy most, if not all, of the district court's factors. Pumping from B to A could be against the "natural" and "continu[ing]" southward flow of the river; the "chemical" and "biological" composition of the river could be different at point B than point A, because of runoff that typically enters the river between points A and B; point B could be geographically different from point A, and effectively "man-made" because it is located in an urban area, where the river bed and banks

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[22/] The Supreme Court's advertence in *Miccosukee* to water quality standards was in the context of its discussion of the statutory question whether water transfers are properly included in the NPDES program and not within its discussion of factors relevant to determining whether waters are meaningfully distinct. *See supra* at 28-29.

have been dramatically altered in a way that is not true at point A; because of differences in the composition of the river as it flows downstream, pumping water upstream could result in a "visible plume" and even "a negative impact" at point A; points A and B could be "classified differently under the CWA"; and, because the river does not flow backwards, waters from point B "would not otherwise reach" point A without the pumping.[23/] A river may even be divided by a physical barrier (the district court's first factor) such as a dam and yet discharges from the dam are excluded from the NPDES permit program. *See* R. 369, Ex. 14, pp. 10-12, 16; *Gorsuch*, 693 F.2d at 174-175183; *cf. S.D. Warren*, 126 S. Ct. at. 1850 (distinguishing discharges through a dam from discharges of a pollutant). Despite the applicability of all those factors, it is inconceivable that points A and B in the same river would be considered "meaningfully distinct water bodies" in the sense meant by the Supreme Court in *Miccosukee*, 541 U.S. at 112. The mere fact that water would not flow from B to A without human intervention could not change the fact that the water was still moving within a single body of navigable water.

4. The district court erred by failing to consider congressional intent that the C & SF Project be managed as an integrated hydrologic system. – The district

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[23/] Indeed, many of the same factors could probably be said of transfers of water from a point near the southern end of Lake Okeechobee to one at the northern end given the variability of the Lake.

court's treatment of waters within the C & SF Project as a series of distinct water bodies is contrary to congressional understanding, manifested in legislative action and reports, that the waters of South Florida function as a comprehensive water system, both historically and under the Project. Congress authorized the C & SF Project in 1948 by approving a Report from the Chief of Engineers. H. Doc. No. 643, 80th Cong. 2d Sess. (1948) (Def. Trial Ex. 205). That Report evidences Congress's understanding that South Florida was a unified water system and its intent that the Project would operate as a comprehensive whole. For example, the Report states that the area including Lake Okeechobee and all Everglades areas to the south "constitute, for all practical purposes, a single watershed as in most cases their waters intermingle during period of heavy rainfall and their problems of water control and use, as well as their economic problems, are closely interrelated." H. Doc. No. 643, 80th Cong. 2d Sess. (1948), Def. Ex. 205 at 15. *See also Id.* at 1 ("The problems of flood protection, drainage, and water control in these areas are physically interrelated . . . . Accordingly, a single comprehensive survey has been made in response to the congressional authorizations, and the resulting unified plan of improvement is presented in this report.") The Report explains that the project would provide flood protection and water control for the land south of Lake Okeechobee; that levees would be constructed around the

perimeter of the Lake; and that a canal network would be constructed with pumps that dispose of excess runoff "*by pumping from the canal network into the lake* and/or conservation area to the south; and would also pump water into the area from Lake Okeechobee when needed during dry seasons." *Id*. at 42 (emphasis added). The pump stations and operations at issue were thus a contemplated part of the comprehensive plan. It was recognized that "each feature of the plan contributes to the realization of the primary benefits" and that "project features are closely interrelated from an engineering standpoint and produce benefits extending beyond immediate locations of the works." *Id*. at 3.

A requirement that NPDES permits be obtained for water transfers between meaningfully distinct water bodies should be applied in pari materia with the congressional authorization for construction of the dike around Lake Okeechobee and pump stations for the very purpose of pumping water from the EAA to the Lake.[24/] *Cf*. *National Wildlife Federation v. U.S. Army Corps of Engineers*, 384

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[24/] This is not to say, however, that the NPDES program does not apply as a blanket matter to operations or facilities within the Project; rather, in determining whether the particular waters at issue here are "meaningfully distinct," congressional understanding and intent as to this Project is appropriately taken into consideration. For example, storm water treatment areas designed to filter nutrients contained in farm runoff into Project canals have appropriately been operating under individual NPDES permits since the first one began operations in 1993. The storm water treatment areas were constructed pursuant to a Settlement Agreement between the United States and state defendants in *United States v.*

F.3d 1163, 1178-79 (9th Cir. 2004) (CWA reconciled with congressional requirement to construct dams by holding that exceedences of state regulatory water quality standards resulting from the existence of the dam do not violate the CWA). Stated differently, in light of the congressional authorization for the C & SF Project and the fact that as a result of this Project Lake Okeechobee functions as a reservoir and water supply impoundment (*see supra* at 14-16), this setting is more closely akin to the dam at issue in *Gorsuch* than it is to the water transfers at issue in *Dubois* or *Catskill*. *Cf. S.D. Warren*, 126 S. Ct. at 1850 n.6 ("Before *Miccosukee*, one could have argued that transferring polluted water from a canal to a connected impoundment constituted an "addition." Miccosukee is at odds with that construction of the statute. . . . .") .

Congress directed a restudy of the C & SF Project in 1992, and in 1996 required the Secretary of the Army to develop a "comprehensive plan for the purpose of restoring, preserving, and protecting the South Florida ecosystem." Water Resources Development Act of 1996, Pub. L. No. 104-303,

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*South Florida Water Management District*, 847 F. Supp. 1567 (1992), *aff'd in part, rev'd in part*, 28 F.3d 1563 (11th Cir. 1994), and the State's Everglades Forever Act, Fla. Stat. § 373.4592. *See* R. 636, p. 44-46. As large, actively-managed, treatment systems built pursuant to CWA § 404, 33 U.S.C. § 1344, a permit is required for the discharges from those facilities into waters of the United States. *See also supra* at 42-43 (activities involving intervening use are not water transfers that are generally excluded from the NPDES program).

§ 528(b)(1)(A)(I), 110 Stat. 3767. In 2000, Congress approved the Comprehensive Everglades Restoration Plan developed by the Secretary, which provides for modifications to the C & SF Project to "restore, preserve, and protect, the South Florida ecosystem," while "providing for other water-related needs of the region, including water supply and flood protection." Water Resources Development Act of 2000, Pub. L. No. 106-541, §§ 601, 602(a), 114 Stat. 2572, 2693 (2000). In implementing projects, the Secretary must "include such features as the Secretary determines are necessary to ensure that all ground water and surface water discharges from any project feature authorized by this subsection will meet all applicable water quality standards and applicable water quality permitting requirements." *Id*. § 601(b)(2)(A)(ii)(II). Lake Okeechobee and the EAA canals at issue here are within the area covered by this effort. In 2007, Congress authorized elements of this Plan. *See* Water Resources Development Act of 2007, § 1001(14)-(16), Pub. L. No. 110-114, 121 Stat. 1041, 1051-52 (2007).

In sum, the Everglades is a unique setting. The statutes and planning efforts reflect congressional understanding that the hydrologic system in South Florida is integrated, not merely a series of disconnected water bodies. Proper consideration of all relevant factors mandates the conclusion that the waters at issue are not

meaningfully distinct and, therefore, no NPDES permit is required to operate the pump stations at issue.

## CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify that the foregoing United States' Brief as Appellant is printed in proportionately spaced typeface of 14 points. The brief is double-spaced except for quotations and footnotes. The brief is double-spaced except for quotations and footnotes. The side, top and bottom margins are one inch. According to the word processing system's tally, the word count for the brief is 13,784 (excluding the Certificate of Interested Persons, Table of Contents, Table of Citations, Certificate of Compliance, and Certificate of Service).

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